Molop Corp Sdn Bhd v Uniperkasa (M) Sdn Bhd

HIGH COURT (MELAKA) — CIVIL SUIT NO 22-135 OF 2002
LOW HOP BING J
27 JUNE 2003

Civil Procedure *— Affidavits — Capacity to affirm — Whether deponent lacked authority — Written confirmation from defendant of deponent's authority — Whether deponent fully and duly authorized to affirm affidavits for defendant — Whether plaintiff's objection purely technical in nature*

Civil Procedure *— Injunction — Injunction to restrain party from presenting a winding up petition against company — Burden of proof cast on plaintiff — Whether plaintiff succeeded in establishing prima facie case — Whether there was bona fide dispute by plaintiff in relation to statutory demand — Whether plaintiff was solvent*

Companies and Corporations *— Winding up — Injunction to restrain petition — Burden of proof cast on plaintiff — Whether plaintiff succeeded in establishing prima facie case — Whether there was bona fide dispute by plaintiff in relation to statutory demand — Whether plaintiff was solvent*

The plaintiff appointed the defendant as its nominated sub-contractor for the M&E works in respect of the proposed design, construction and completion of a school in Kota Tinggi, Johor. Menara Teknik was appointed by the plaintiff as the M&E consultant ('the M&E consultant'). On 7 June 2002, the M&E consultant issued a certificate of interim payment in respect of the defendant's M&E works and variation order ('interim payment No 7') for the sum of RM194,435.90 ('the said sum'). On 16 July 2002, the defendant through its solicitors served a statutory demand, issued under s 218 of the Companies Act 1965 ('the Act'), on the plaintiff demanding for the payment of the said sum. The plaintiff, through its solicitors' letter dated 5 August 2002, disputed the statutory demand. According to the plaintiff, it was not legally obliged to pay the said sum to the defendant as the latter's claim was premature; the interim certificate for payment for the works was invalid as the project management consultant, had not issued the certificate of practical completion for the project. The plaintiff stated that the duty of the M&E consultant was to prepare the evaluation of the works carried out by the plaintiff as the principal contractor and not for the works carried out by the defendant as a nominated sub-contractor. The plaintiff further stated that the defendant could not rely on interim payment No 7 because the defendant had not supplied the 'as built' design and the operating manual to the plaintiff and had not completed the testing and commissioning works. This was the plaintiff's application under O 29 of the Rules of the High Court 1980 ('RHC') for an interlocutory injunction to restrain the defendant, its directors, agents and servants from: (a) presenting a winding up petition in connection with the statutory demand; and (b) taking any steps to advertize or gazette the

winding up petition and further proceedings in connection with the statutory demand. The plaintiff's counsel raised a preliminary objection pertaining to the lack of authority on the part of the deponent of the defendant's affidavits. A

Held, overruling the preliminary objection but allowing the plaintiff's application: B

(1) The preliminary objection was raised for the plaintiff without a meticulous and proper perusal of the affidavits. In each of the defendant's affidavits, the deponent affirmed that he had been fully and duly authorized to affirm the affidavit on behalf of the defendant and that all the facts deposed therein were within his personal knowledge and were true from the documents, files and records in his possession or to which he had access. There was also a written confirmation from the defendant of the deponent's authority in that behalf. As such, the court was satisfied that the deponent was fully and duly authorized to affirm the affidavits for the defendant, a fortiori when the defendant had confirmed such authorization in writing (see pp 317C–E, 318B). C D

(2) In any case, the plaintiff's preliminary objection was purely technical in nature which would have been attractive and indeed upheld had there been no subsequent judicial exhortations and recent amendments to the RHC, which had collectively put an end to any reliance on procedural objections based on technical non-compliance with the rules, and to proceed with substantive issues and justice of the case (see p 318D–E). E

(3) The burden of proof cast on the plaintiff in an application for interlocutory injunction to restrain the presentation of a winding up petition was to establish a prima facie case. Illustrations of a prima facie case may be provided by evidence that there was a bona fide dispute by the plaintiff in relation to the statutory demand or that the plaintiff was solvent (see p 321A–D); *Natseven TV Sdn Bhd v Television New Zealand Ltd* [2001] 4 CLJ 722 followed. F G

(4) In the instant case, there was sufficient evidence for the court to come to the conclusion that the plaintiff had established a prima facie case of a bona fide dispute on the sum claimed by the defendant in the statutory demand as there was no judgment obtained thereon against the plaintiff and the sum sought to be recovered by the defendant was in connection with works carried out by the defendant as a nominated sub-contractor in the project (see p 321G–H); *Bank Utama (M) Bhd v GKM Amal Bhd* [2000] 5 MLJ 657 followed. H

(5) The most appropriate stage for a creditor to wind up a debtor company was after the crystallization of the claim into a judgment sum, even if it was a default judgment. Such a judgment would effectively eradicate every endeavour to raise any dispute on the I

judgment sum at the hearing of a winding up petition, as the default judgment would still be a valid and regular judgment and until it was set aside, it was binding (see p 322A–B).

(6) The presumption of inability to pay debts under s 218(2)(a) of the Act was a rebuttable presumption, as a company failing to heed a valid statutory demand would not be wound up if it can establish by independent evidence that it was solvent. Based on the affidavits filed by the plaintiff, it had established a prima facie case of its solvency. As such, the plaintiff had rebutted the presumption under s 218(2)(a) of the Act. However, in order to put the matter beyond any doubt, the plaintiff was directed to deposit the said sum with the plaintiff's solicitors as a stakeholder on or before 27 July 2003 subject to the solicitors' undertaking not to release the said sum save and except to satisfy the defendant's statutory demand, if any, in the form of a judgment sum adjudged and ordered by a court of competent jurisdiction (see pp 322E–G, I–323B).

[Bahasa Malaysia summary

Plaintif telah melantik defendan sebagai subkontraktor yang dilantik untuk kerja-kerja M&E berhubung cadangan rekaan, pembinaan dan penyelesaian sebuah sekolah di Kota Tinggi, Johor. Menara Teknik telah dilantik oleh plaintif sebagai perunding M&E ('perunding M&E'). Pada 7 Jun 2002, perunding M&E telah mengeluarkan satu sijil untuk bayaran interim berhubung kerja-kerja M&E defendan dan perintah pelbagaian ('bayaran interim No 7') untuk jumlah RM194,435.90 ('jumlah tersebut'). Pada 16 Julai 2002, defendan melalui peguamcaranya telah menyampaikan satu tuntutan statutori, yang dikeluarkan di bawah s 218 Akta Syarikat 1965 ('Akta tersebut'), ke atas plaintif menuntut bayaran untuk jumlah tersebut. Plaintif, melalui surat peguamcaranya bertarikh 5 Ogos 2002, telah mempertikaikan tuntutan statutori tersebut. Menurut plaintif, ia tidak diwajibkan untuk membayar jumlah tersebut kepada defendan kerana tuntutan defendan adalah pra masa; sijil interim untuk bayaran untuk kerja-kerja tersebut adalah tidak sah kerana perunding pengurusan projek, tidak mengeluarkan sijil penyelesaian praktikal untuk projek tersebut. Plaintif menyatakan bahawa tugas perunding M&E adalah untuk menyediakan penilaian kerja-kerja yang dilaksanakan oleh plaintif sebagai kontraktor utama dan bukan untuk kerja-kerja yang dilaksanakan oleh defendan sebagai subkontraktor yang dilantik. Plaintif seterusnya menyatakan bahawa defendan tidak boleh bergantung kepada bayaran interim No 7 kerana defendan tidak membekalkan rekaan 'as built' dan manual operasi kepada plaintif dan tidak menyelesaikan kerja-kerja ujian dan pengkomisenan. Ini adalah permohonan plaintif di bawah A 29 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk satu injunksi interlokutori bagi menghalang defendan, pengarah-pengarahnya, ejen-ejen dan pekerja-

pekerja daripada: (a) mengemukakan satu petisyen penggulungan berkaitan tuntutan statutori; dan (b) mengambil langkah-langkah untuk mengiklankan petisyen penggulungan dan prosiding seterusnya berkaitan tuntutan statutori. Peguam plaintif telah menimbulkan satu bantahan awal berkaitan kurangnya kuasa di pihak deponen ke atas afidavit-afidavit defendan.

Diputuskan, menolak bantahan awal tetapi membenarkan permohonan plaintif:

(1) Bantahan awal telah ditimbulkan bagi pihak plaintif tanpa penelitian yang cermat dan betul terhadap afidavit-afidavit tersebut. Dalam setiap afidavit defendan, deponen telah menegaskan bahawa beliau mempunyai kuasa penuh dan sewajarnya untuk mengesahkan afidavit-afidavit bagi pihak defendan dan bahawa semua fakta-fakta yang dideposkan adalah dalam pengetahuan peribadi beliau dan adalah benar daripada dokumen-dokumen, fail-fail dan rekod-rekod dalam milikan beliau atau yang mana beliau mempunyia akses. Terdapat juga pengesahan bertulis daripada defendan tentang kuasa deponen berkaitan yang tersebut. Oleh itu, mahkamah berpuas hati bahawa deponen mempunyai kuasa penuh dan sewajarnya untuk mengesahkan afidavit-afidavit bagi pihak defendan, a fortiori apabila defendan telah mengesahkan kuasa tersebut secara bertulis (lihat ms 317C–E, 318B).

(2) Dalam apa keadaan, bantahan awal plaintif adalah bersifat teknikal semata-matanya yang memang menarik dan dikekalkan sekiranya tiada gesaan-gesaan kehakiman berikutnya dan pindaan-pindaan terkini kepada KMT, yang telah secara kolektifnya menamatkan apa-apa kebergantungan kepada bantahan-bantahan prosedur berdasarkan ketidakpatuhan teknikal terhadap kaedah-kaedah, dan untuk meneruskan dengan persoalan-persoalan substantif dan keadilan kes (lihat ms 318D–E).

(3) Beban bukti yang terletak atas plaintif dalam satu permohonan untuk injunksi interlokutori bagi menghalang penyampaian satu petisyen penggulungan adalah untuk membuktikan satu kes prima facie. Ilustrasi-ilustrasi satu kes prima facie boleh didapati melalui keterangan di mana terdapat satu pertikaian bona fide oleh plaintif berkaitan tuntutan statutori atau di mana plaintif adalah solven (lihat ms 321A–D); *Natseven TV Sdn Bhd v Television New Zealand Ltd* [2001] 4 CLJ 722 diikut.

(4) Dalam kes semasa, terdapat keterangan yang mencukupi untuk mahkamah membuat kesimpulan bahawa plaintif telah membuktikan satu kes prima facie case tentang satu pertikaian bona fide berhubung jumlah yang dituntut oleh defendan dalam tuntutan statutori kerana tiada penghakiman telah diperolehi terhadap plaintif dan jumlah yang dipohon untuk dikembalikan

oleh defendan adalah berkaitan dengan kerja-kerja yang dilaksanakan oleh defendan sebagai subkontraktor yang dilantik dalam projek tersebut (lihat ms 321G–H); *Bank Utama (M) Bhd v GKM Amal Bhd* [2000] 5 MLJ 657 diikut.

(5) Peringkat yang paling sesuai untuk seorang pemiutang menggulungkan sebuah syarikat penghutang adalah selepas penghabluran tuntutan tersebut ke dalam jumlah penghakiman, walaupun ia adalah satu penghakiman ingkar. Penghakiman sedemikian akan membanteraskan dengan berkesan setiap usaha untuk menimbulkan apa-apa pertikaian berhubung jumlah penghakiman semasa perbicaraan suatu petisyen penggulungan, kerana satu penghakiman ingkar adalah masih satu penghakiman yang sah dan biasa dan sehingga ia diketepikan, ia adalah terikat (lihat ms 322A–B).

(6) Tanggapan ketidakmampuan untuk membayar hutang di bawah s 218(2)(a) Akta tersebut adalah satu andaian yang boleh dipatahkan, kerana sebuah syarikat yang gagal untuk mengambil perhatian terhadap satu tuntutan statutori tidak akan digulungkan jika ia dapat membuktikan melalui keterangan berasingan bahawa ia adalah solven. Berdasarkan afidavit-afidavit yang difailkan oleh plaintif, ia telah membuktikan satu kes prima facie tentang kesolvenannya. Oleh itu, plaintif telah mematahkan andaian di bawah s 218(2)(a) Akta tersebut. Namun begitu, untuk tidak menimbulkan sebarang keraguan, plaintif telah diarahkan untuk mendepositkan jumlah tersebut dengan peguamcara plaintif sebagai pemegang amanah pada atau sebelum 27 Julai 2003 tertakluk kepada akujanji peguamcara untuk tidak melepaskan jumlah tersebut kecuali untuk memenuhi tuntutan statutori defendan, jika ada, dalam bentuk penghakiman yang diadili dan diperintahkan oleh mahkamah yang mempunyai bidang kuasa yang kompeten (lihat ms 322E–G, I–323B).]

Notes

For cases on the capasity to affirm affidavits, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 317.

For cases on injunctions to restrain parties from presenting a winding up petition against a company, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 2598.

For cases on injunctions to restrain winding up petitions, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1007–1016.

Cases referred to

Bank Utama (M) Bhd v GKM Amal Bhd [2000] 5 MLJ 657 (folld)

Bank Utama (M) Bhd v Seri Mayhua Sdn Bhd & Ors [2001] 5 MLJ 169 (refd)

Dayakuasa Holdings Sdn Bhd v Kayaal Holdings Sdn Bhd [2003] 3 AMR 286 (refd)

Faco Pty Ltd, Re [1988] 14 ACLR 518 (refd)
Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd [2000] 2 MLJ 98 (refd)
Masboh Trading Sdn Bhd v Mejaris Builders Sdn Bhd [2001] 5 MLJ 369 (refd)
Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M Bhd [2002] 1 MLJ 385 (refd)
Mokhtar bin Amin v Mohamed Moktar Omar [2001] 4 MLJ 329 (refd)
Natseven TV Sdn Bhd v Television New Zealand Ltd [2001] 4 CLJ 722 (folld)
RHB Bank Bhd v Pembinaan MCP Sdn Bhd [2002] MLJU 597; [2003] 1 AMR 620 (refd)
Salak Park Development Sdn Bhd v Fajar Menyensing Sdn Bhd [1994] MLJU 421 (refd)
Syarikat Ying Mui Sdn Bhd v Muthusamy a/l Sellapan and other appeals [1999] 6 MLJ 622 (refd)
United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2001] 1 MLJ 561 (refd)

Legislation referred to

Companies Act 1965 s 218(1)(e), (2)(a)
Rules of the High Court 1980 O 29, O 41

Sheena M Sinnappah (*Ho & Co*) for the plaintiff.
Ong Ban Chai (*Andre Wee Heng Leong* with him) (*Yap Koon Roy & Assoc*) for the defendant.

Low Hop Bing J:

Application

This is the plaintiff's application in encl (3) under O 29 of the Rules of the High Court 1980 for an interlocutory injunction to restrain the defendant, the defendant's directors, agents and servants from presenting a winding up petition in connection with a statutory notice dated 16 July 2002 issued under s 218 of the Companies Act 1965 ('the statutory demand') which the defendant has served on the plaintiff, and also to restrain the defendant from taking any steps to advertize or gazette the winding up petition and further proceedings in connection with the statutory demand.

For brevity, a reference to a section and an order is a reference to that section and order in the Companies Act 1965 and the Rules of the High Court 1980 respectively.

Plaintiff's preliminary objection

The plaintiff through learned counsel Miss Sheena M Sinnappah raised a preliminary objection pertaining to the lack of authority on the part of one Abdul Hadi bin Arshad, the deponent of affidavits in encll (8), (10) and (13) for the defendant, on the ground that the deponent was not an

A employee of the defendant; and that in the letter in encl (4), the deponent signed in his capacity as the defendant's managing director while in the said affidavits, he affirmed as the defendant's manager, in which case, she added the affidavits were imcompetent and inadmissible. For this purpose, she cited *Bank Utama (M) Bhd v Seri Mayhua Sdn Bhd & Ors* [2001] 5 MLJ 169 (HC).

B Mr Ong Ban Chai, assisted by Mr Andre Wee Heng Leong, both learned counsel for the defendant, contended that in all the aforesaid three affidavits, the deponent did state that he has been duly authorized to affirm on behalf of the defendant and that all the facts were within his personal knowledge and from documents, files and records to which he has access.

C As a matter of fact, it is absolutely clear to me that the preliminary objection was raised for the plaintiff without resorting to the opportunity of embarking upon a meticulous and proper perusal of the aforesaid three affidavits, each of which contains the opening paragraph with the words 'telah diberikuasa sepenuhnya dan sempurna untuk membuat afidavit ini bagi pihak defendan' ('has been fully and duly authorized to affirm this D affidavit on behalf of the defendant').

Further, para 2 of each of these affidavits affirmed that all the facts deposed therein were within the personal knowledge of the deponent and were true from the documents, files and records in his possession or to which he has access.

E Quite apart from that, there was written confirmation from the defendant of the deponent's authority in that behalf.

In *Bank Utama (M) Bhd* on which the plaintiff relied, one Chan Chew Guan, an audit senior who has personal knowledge and access to the documents and records of the plaintiff, affirmed an affidavit for the plaintiff F as its former officer but did not say that he was authorized to affirm it on behalf of the plaintiff. A preliminary objection was raised for the defendant that Chan was not authorized to affirm the said affidavit. Sulaiman JC (now J) held that the said affidavit affirmed by Chan was not in its nature an affidavit sworn for and on behalf of the appellant relating to its affairs, business or dealings but was sworn solely for the purpose of adducing G evidence within his personal knowledge relating to the signing of a material document which was made in his presence and to other matters related thereto, in which case the said affidavit was admitted.

An affidavit made without stating any specific authorization has been accepted by Skinner JC (now J) in *Syarikat Ying Mui Sdn Bhd v Muthusamy* H *a/l Sellapan and other appeals* [1999] 6 MLJ 622, on the following grounds at pp 630–631:

> It is pertinent to note that by virtue of r 1(4) of the Order, an employee of a party to a cause or matter may swear an affidavit but the affidavit must state that fact. There is however no requirement that such employee must go on further to state that he is also authorized to swear the affidavit before it can be I read in the cause or matter. This shows that authority is not a prerequisite to swearing an affidavit. ..... Perhaps the position becomes clearer by looking at how evidence is adduced in the court at different stages of a cause or matter.

> At trial, evidence will normally be introduced through the oral testimony of a witness but there is no requirement that before a person testifies, he must be authorized to do so by the party who calls him. If the authority to testify is not prerequisite at a trial that position must surely not change just because a matter is at an interlocutory stage when evidence is introduced through affidavit evidence.

The cumulative effect of O 41, *Syarikat Ying Mui Sdn Bhd* and *Bank Utama (M) Bhd*, undoubtedly demonstrated a legal and judicial liberalization in the admissibility of affidavits in the circumstances alluded to above.

In the matter before me, I am satisfied that the deponent is fully and duly authorized to affirm the affidavits for the defendant; a fortiori when the defendant has indeed confirmed such authorization in writing.

If at all there is any complaint of a lack of authority on the part of the deponent, the complainant should be the defendant who is the principal providing the source of the authority, and it is this source, ie the defendant that has the locus to withdraw or revoke the authority of the deponent. A stranger such as the plaintiff does not have the locus to deny the deponent of that authority. The true position was that there was no withdrawal or revocation by the defendant of such authority.

It must not be forgotten that the preliminary objection is purely technical in nature which would have been attractive and indeed upheld had there been no subsequent judicial exhortations and recent amendments to the Rules of the High Court 1980, which have collectively put an end to any reliance on procedural objections based on technical non-compliance with the rules, and to proceed with substantive issues and justice of the case (see *Beauford Baru Sendirian Berhad v Gopala Krishnan a/l VK Gopalan* [2002] 4 AMR 4462, at pp 4468–4469 (HC); *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2001] 1 MLJ 561 (CA)).

Besides, O 2 r 3 of the Rules of the High Court (Amendment) 2002 (PU(A) 197/2002) which came into force on 16 May 2002 reads as follows:

> *Preliminary objection for non-compliance of rules not allowed (O 2 r 3)*
>
> 3 A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

Further, O 1A, which also took effect on 16 May 2002 vide the same amendment rules, provides as follows:

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

In *Beauford Baru Sendirian Berhad*, I said:

> It is clearly the intention and wisdom of the Rules Committee to provide for smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections. In my considered opinion, the advent of these

amendments would mark the beginning of the end of learned counsel's urge to raise objections merely on strictly technical grounds and it is my fervent hope that learned counsel's preliminary procedural technical objections would henceforth be consigned to oblivion for good.

(See also *Megat Najmuddin bin Dato Seri (Dr) Megat Khas v Bank Bumiputra (M Bhd* [2002] 1 MLJ 385 (FC))

In *Mokhtar bin Amin v Mohamed Moktar Omar* [2001] 4 MLJ 329, the Court of Appeal held, inter alia, that non-compliance with procedural requirements should not be treated as invalidating any action or other proceeding or step taken therein unless it occasions a substantial miscarriage of justice.

In the circumstances, I am unable to see any solid ground on which the preliminary objection could stand, as a result of which I hereby dismiss it.

Prelude to statutory demand

The plaintiff is a company registered under the Companies Act 1965 having its registered address at 34–1, Lorong Haruan 5/2, Oakland Commerce Square 70300 Seremban, and has a place of business at No 20–B, Jalan Malim Jaya 2/1, Taman Malim Permai, 75250 Melaka.

The defendant is also a similarly registered company having a place of business at No 21/1, Jalan Mangga, Taman MGBM, Bachang, Melaka.

On 20 October 2000, the plaintiff appointed the defendant as a nominated subcontractor ('NSC') for M &, E works for the proposed design, construction and completion of the National Secondary School in Sri Pinang, mukim of Hulu Sungai Johor, Kota Tinggi, Johor ('the project').

The plaintiff has appointed M/s Menara Teknik as M & E consultant ('the consultant').

On 30 March 2002, the consultant issued the certificate of interim payment for the NSC's M &, E works together with variation order (No 6) for the sum of RM212,553.17.

On 11 April 2002, the defendant issued a statutory demand under s 218 ('first statutory demand') for the sum of RM212,553.17.

On 14 May 2002, the plaintiff made a payment of RM50,000 to the defendant and the first statutory demand was withdrawn on the same day.

On 7 June 2002, the consultant issued a certificate of interim payment for the NSC's M &. E works together with variation order (No 7) for the sum of RM 194,435.90 ('the said sum').

On 16 July 2002, the defendant through its solicitors served the statutory demand on the plaintiff at the plaintiff place of business, claiming the said sum from the plaintiff for works done and services rendered in respect of the project, to be paid within 21 days of the said date, failing which the plaintiff shall be deemed to be unable to pay its debts and the defendant would proceed to present a petition for winding up the plaintiff.

It is this statutory demand that has led to the present application.

The plaintiff through its solicitors' letter dated 5 August 2002 disputed the statutory demand and stated that the plaintiff was not legally obliged to pay the said sum, as it was a premature claim.

Plaintiff's submission

It was submitted for the plaintiff that the statutory demand was *bona fide* disputed by the plaintiff in that the interim certificate for payment for the works was said to have been improperly issued and hence invalid, as the project management consultant M/s Urusbudi Consultant Sdn Bhd has not issued the certificate of practical completion for the project.

The plaintiff argued that the duty of the consultant was to prepare the evaluation of the works carried out by the plaintiff as the principal contractor of the project owner ie the Ministry of Education and not for the works carried out by the defendant as a NSC, nor to blindly certify the amount for the defendant, and that the consultant's letter dated 16 September 2002 has confirmed this.

The stand taken for the plaintiff is that the defendant could not rely on the consultant's certificate of payment No 7 – Final and that as at 5 August 2002, the defendant has not supplied the 'as built' design and the operating manual to the plaintiff and has not completed the testing and commissioning works.

It was also submitted for the plaintiff that the defendant's works were defective resulting in the plaintiff's claim for set-off against the defendant.

Defendant's contention

Defendant's learned counsel submitted that the plaintiff's dispute is not *bona fide* as the plaintiff has failed to disclose to the court the fact that the defendant did on 7 August 2002 reply to the letter dated 5 August 2002 of the plaintiff's solicitor for the purpose of proposing the mode of settlement, and that the consultant, the plaintiff's own project coordinator, did on 30 May 2002 confirm that the M &, E works had been carried out, as a result of which the plaintiff is estopped from disputing.

They added that the plaintiff's so-called involvement in the upgrading of Federal Road 8 from Bentong to Kuala Lipis Segment 6 (Bentong to Kuala Lipis) and Segment 8 (Kuala Lipis to Kampong Relong) Pahang amounting to RM149,585,174.77 did not provide particulars of the plaintiff's profit margin.

They added that their search at the Registry of Companies showed that as at 21 September 2001 their liability exceeded their asset by RM200,846 and had brought forward a loss of RM559,816.

Another contention for the defendant is that the plaintiff has the option of depositing the said sum in court, and that the plaintiff has failed to establish a *prima facie* case against the defendant in order to obtain the injunction, since the plaintiff has made payments pursuant to six previous interim certificates of payment issued by the plaintiff's project coordinator.

A *Decision of the court*

Prima facie case

In *Natseven TV Sdn Bhd v Television New Zeland Ltd* [2001] 4 CLJ 722, I had the occasion to consider and determine the burden of proof cast on the plaintiff in an application for interlocutory injunction to restrain the presentation of a winding up petition, in the following words:

> I agree with the reasons given by the English and New Zealand Court of Appeal respectively and by Abdul Malik J and hold that for the purpose of obtaining an interim injunction to restrain the defendant from proceeding with the winding up petition, the burden of proof cast on the plaintiff is only discharged by reference to the standard of proof or test in adducing evidence to establish a *prima facie* case and that the principle relating to the test of 'serious question to be tried' in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504 as applied in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 is not applicable as the applications there were not applications to restrain winding up petitions or proceedings, such as in the instant case before me.

Illustrations of a prima facie case may be provided by necessary evidence that there is a bona fide dispute by the plaintiff in relation to the statutory demand or that the plaintiff is solvent.

Bona fide dispute

In *Bank Utama (M) Bhd v GKM Amal Bhd* [2000] 5 MLJ 657, Abdul Aziz J (now JCA) explained a 'disputed debt' as follows (at p 660):

> ..... it is a debt in respect of which it is shown, with grounds supported by evidence, that there is a bona fide dispute. A debt is not a disputed debt in that context simply because the respondent maintains that he disputes the debt. A judgment on the debt establishes in law that there is no bona fide dispute as to the debt. The judgment is good until it is set aside on appeal, and it is enforceable unless a stay has been granted. The fact that the debtor has lodged an appeal against the judgment merely means that he still disputes the debt but does not establish that the debt is bona fide disputed. The judgment has already established the contrary.

On the facts of this application as unfolded above, I am of the view that there is sufficient evidence for me to come to the conclusion that the plaintiff has established a prima facie case of a bona fide dispute on the sum claimed by the defendant in the statutory demand as there was no judgment obtained thereon against the plaintiff and that the sum sought to be recovered by the defendant was in connection with works carried out by the defendant as a NSC in the project.

In *Dayakuasa Holdings Sdn Bhd v Kayaal Holdings Sdn Bhd* [2003] 3 AMR 286, at pp 294–295, I observed as follows:

> ... it is trite law that an admission of debt would defeat the opposition to a winding up petition: Malayan Bank Bhd, supra, or where a dispute is not bona fide: *Sri Binaraya Sdn Bhd v Golden Approach Sdn Bhd* [2000] 3 MLJ 465; *Ann Joo Metal Sdn Bhd v Pembenaan MY Chahaya Sdn Bhd* [2000] 5 MLJ 708.

The position in relation to the instant application would have been otherwise if there had been an admission by the plaintiff of a debt and an undertaking to secure payments. However, this is not to be the case here. A

I would add that the most appropriate stage for a creditor to wind up a debtor company is after the crystallization of the claim into a judgment sum, even if it is a default judgment. Such a judgment would effectively eradicate every endeavour to raise any dispute on the judgment sum at the hearing of a winding up petition, as the default judgment is still a valid and regular judgment and until and unless it is set aside, it is binding (see *Natseven TV Sdn Bhd v Television New Zealand Ltd; RHB Bank Bhd v Pembinaan MCP Sdn Bhd* [2002] MLJU 597; [2003] 1 AMR 620. B

In the instant case, I am of the view that the plaintiff has established a prima facie case of a bona fide dispute in relation to the statutory demand. C

Plaintiff's solvency

Section 218 provides for the circumstances in which a company may be wound up by the court and one such circumstance is that the company is unable to pay its debts under s 218(1)(e). D

A company is presumed to be unable to pay its debts if a creditor to whom the company is indebted in a sum exceeding RM500 has served a statutory demand and the company has for three weeks thereafter neglected to pay the sum. E

The presumption under s 218(2)(a) is a rebuttable presumption, as a company failing to heed a valid statutory demand would not be wound up if it can establish by independent evidence that it is solvent (see *Malaysia Air Charter Co Sdn Bhd v Petronas Dagangan Sdn Bhd* [2000] 2 MLJ 98 following *Re Faco Pty Ltd* [1988] 14 ACLR 518 which was followed in *Masboh Trading Sdn Bhd v Mejaris Builders Sdn Bhd* [2001] 5 MLJ 369 (HC). F

In *Dayakuasa Holdings* and *Salak Park Development Sdn Bhd v Fajar Menyensing Sdn Bhd* [1994] MLJU 421 (HC), where the respective company's solvency was beyond question, an injunction was granted to restrain the defendant from presenting a winding up petition. G

After perusing the affidavits filed herein, it is my specific finding that the plaintiff has also established a prima facie case of its solvency, particularly by reference to the aforesaid road construction projects.

In the circumstances, I am of the view that the plaintiff has rebutted the presumption under s 218(2)(a). H

Conclusion

On the foregoing grounds, I hold that the plaintiff's application should be allowed. I therefore make an order in terms thereof.

Be that as it may, in order to put the matter beyond any doubt, especially in respect of the plaintiff's dispute on the debt and solvency, I direct that on or before 27 July 2003, the plaintiff do deposit a sum of I

A RM194,435.50 with the plaintiff's solicitors who shall inform the defendant's solicitors in writing with a copy to the registrar of this court, and the plaintiff's solicitors shall hold the same in an interest-bearing client's account as stakeholders on an undertaking not to release the said sum together with all accrued interest save and except to satisfy the defendant's statutory demand, if any, in the form of a judgment sum adjudged and
B ordered by a court of competent jurisdiction.

Costs

On the issue of costs, it is to be observed that the plaintiff's preliminary objection has been dismissed while this application is allowed. I therefore
C order each party to bear its own costs.

Preliminary objection dismissed but plaintiff's application allowed.

Reported by Lim Lee Na

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